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FILED
DISTRICT COURT OF GUAM
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MARY L.M. MORAN
CLERK OF COURT

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9 **IN THE UNITED STATES DISTRICT COURT**
10 **FOR THE TERRITORY OF GUAM**

11 UNITED STATES OF AMERICA,)
12)
13 Plaintiff,)
14)
15 vs.)
16 WEN YUEH LU,)
Defendant.)

MAGISTRATE CASE NO. 06-00031

**UNITED STATES RESPONSE TO
DEFENDANT'S OPPOSITION TO
GOVERNMENT'S MOTION TO
DISMISS**

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18 The United States has moved to dismiss this complaint pursuant to FRCrP 48(a). This
19 rule, which requires leave of the court, was promulgated in response to the former practice of
20 some prosecutors, of dismissing charges prior to trial for purposes of harassing defendants by
21 dismissing and reindicting without triggering the protections of the double jeopardy clause.
22 United States v. Hayden, 860 F.2d 1483, 1487 (9th Cir. 1988). It was not enacted "for the
23 purpose of usurping the traditional role of the prosecutor to determine whether to terminate a
24 pending prosecution." Id. The court cited United States v. Cowan, 524 F.2d 504, 513 (5th Cir.
25 1975): "The Executive remains the absolute judge of whether a prosecution should be initiated
26 and the first and presumptively the best judge of whether a pending prosecution should be
27 terminated." Hayden went on to hold, that if "the district court finds that the prosecutor is acting

1 in good faith in making its Rule 48(a) motion, it should grant the motion; conversely, Rule 48(a)
2 empowers the district court to exercise its discretion in denying the motion when it specifically
3 determines that the government is operating in bad faith. Id.

4 The possibility of new and more serious charges is a valid, good faith reason for the
5 government to move to dismiss a case. In United States v. Wallace, 848 F.2d 1464 (9th Cir.
6 1988), defendant was initially pending trial on charges related to heroin dealing. Prior to trial,
7 however, the government moved to dismiss the indictment without prejudice, advising the court
8 that it had initiated an investigation into possible tax violations as well. The court granted the
9 motion without prejudice. Some 13 months later, the government re-indicted the case, adding
10 numerous counts of drug trafficking, but no counts related to tax evasion. The district court
11 dismissed with prejudice the counts which had been the subject of the first indictment, and the
12 government appealed. The Ninth Circuit held that the district court had abused its discretion,
13 because the reasons for the government's first dismissal had been proper. There was no showing
14 that the initial motion to dismiss was made for purposes of harassing the defendant, or gaining a
15 tactical advantage. The defendant failed to show the government was not acting in bad faith,
16 though the re-indictment occurred after she had lost a witness and the government had gained
17 another witness to her drug trafficking. The court cited United States v. Goodwin, 457 U.S. 368,
18 382 (1982): "An initial [indictment] decision should not freeze future conduct. ... [The] initial
19 charges filed by a prosecutor may not reflect the extent to which an individual is legitimately
20 subject to prosecution."

21 The district court's decision to dismiss a case with prejudice was reversed by the Ninth
22 Circuit, though it occurred the day of trial, after the government announced it was unable to
23 proceed because it had lost its only witness. United States v. Hattrup, 763 F.2d 376 (9th Cir.
24 1985), held that the judge had abused his discretion because there was no showing that the
25 government sought the dismissal to gain a tactical advantage or to harass the defendants. The
26 court's inherent power to dismiss the indictment with prejudice should only be exercised "with
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1 great caution, and only after a forewarning to prosecutors of the consequences,” citing United
2 States v. Simmons, 536 F.2d 827, 836 (9th Cir. 1976).

3 In this case, the government moved to dismiss this charge on January 26, a full week
4 before trial. The defendant opposes the dismissal of this complaint because he wants to enter a
5 plea of nolo contendere,. But in the alternative, if the court denies his motion, then he wants it
6 dismissed with prejudice. In short, defendant seeks to deny that he committed the acts
7 underlying his present charge, and at the same time to create a double jeopardy bar to the
8 government bringing subsequent charges based on the same conduct. The government is acting
9 in good faith. It is seeking this dismissal pending a decision by the Judge Advocate General of
10 the United States Coast Guard as to the applicability of a newly enacted statute, 18 U.S.C. §
11 2237. The government may properly dismiss a matter if it has reason to believe that further
12 charges may be brought as a result of defendant’s conduct. Accordingly, it would be an abuse of
13 this court’s discretion to dismiss this complaint with prejudice.

14 Respectfully submitted this 31st day of January, 2007.

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